structure for mobile communications afforded only marginal opportunities for new entrants. Only two bands were allocated per market, and radio common carriers were limited to one spectrum block per market, while wireline carriers acquired spectrum reserved for their use without competition from non-wireline carriers and others.

Licensing procedures have also diminished the prospects for non-dominant participation opportunities. In licensing cellular radio facilities, for example, the Commission initially considered using comparative hearings with geographical and technical criteria, but decided to avoid the problems it encountered with comparative broadcast hearings. As a result, the FCC later adopted random selection processes after Congress authorized lotteries.[60] Later, after initially concluding that implementation of certain preferences in accordance with provisions in the enabling legislation would not offend applicable law, the Commission reversed itself and declined to implement the preference

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2d 771 (1975); aff'd sub. nom. NARUC v. FCC, 525 F. 2d 630 (D.C. Cir. 1976), cert. denied 425 U.S. 992 (1976).

[60] Because availability of service is a primary goal, the geographic area that an applicant proposed to serve was considered a major basis of comparison. Significant factors under this criterion included population density, and substantial need for the services proposed, including the results of public need surveys. The second major comparative factor was the applicant's ability to expand its system capacity to serve increasing numbers of subscribers as warranted by market demand. Preference was to be given to designs entailing efficient frequency use, and personnel and practices were to be significant to the extent that they affect an applicant's ability to implement service. Separate Allocation Order, supra, at pp. 502, 503.

provisions.[61] Ultimately, lotteries did not produce the benefits Congress intended. Increased participation by speculative applicants statistically reduced the probability of successful license acquisition, and expanded the Commission's workload. Dissatisfied with this outcome, Congress repealed the FCC's lottery authority in the Licensing and Spectrum Act of 1993.

The Advisory Committee on Alternative Financing Sources for Minority Ownership in Telecommunications (hereafter, "Rivera Committee") devoted substantial attention to proposals to grant capital gains deferrals on aftermarket transactions to achieve increased minority ownership non-broadcast services. The Commission implemented some of the Rivera Committee's creative finance recommendations.[62] But it generally declined to state a policy on ownership of common carrier transactions despite an explicit Congressional delegation of authority under the 1981 Lottery Statute, and it did not extend tax certificate treatment to promote minority ownership in common carrier industries for which it adopted diversity policies. As a result, applicant uncertainty about non-broadcast comparative standards persists.[63]

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[61] 89 FCC 2d at 279-81.

[62] The Commission responded by adopting policies on tax certificates for transactions involving start-up investments and minority acquisition of cable facilities. The Commission also later extended diversity policies to random selection of licensees for MMDS facilities, a class of mass communications facilities the FCC regulates as common carriers.

[63] Cellular Mobile Systems of Tampa, 98 FCC 2d 231, 234-35 (1984) (declining to award preferences for minority ownership). For example, "no one has yet articulated what public interest would be furthered" by awarding preferences to foster minority ownership

Spectrum auctions have several benefits compared to comparative hearings, but will also have features adverse to non-dominant interests. On one hand, by auctioning spectrum, the Commission may be able to eliminate some of the delay in the deployment of new infrastructure. In theory, auctions are supposed to ensure that licenses are awarded to the parties that value them most and these parties are, in turn, supposed to facilitate efficient aggregation of licenses. On the other hand, since the applicant's worthiness to be an FCC licensee is measured in terms of bid prices, it is unlikely that substantial expenses which deter those "presently unable to incur such costs" will decrease.

Herein lies the major problem with spectrum auctions from a non-dominant perspective. By definition, an auction is a pricing mechanism that allocate resources in a manner that discriminates against all bidders except the one with the greatest ability to pay. Indeed, one of the major justifications for reliance on auction prices as a selection criterion selection is the efficient method of exclusion. "[A]uctions are an efficient way of reducing the number of applicants" because they "require winning bidders to make substantial payments in return for being licensed."[64] The problem with this method of exclusion is that many potential license seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the opportunity to offer licensed communications services to the public, no matter

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in new telecommunications ventures.

[64] Felker and Kwerel, supra.

how qualified they might be, and no matter how broad [the consumer demand or public need for their services.[65]

The likely adverse impact spectrum auctions on non-dominant entities is both directly or indirectly documented in findings by past FCC advisory committees. The FCC's 1978 Task Force on Minority Ownership was mindful that "more efficient use of spectrum space may be necessary" if opportunities for new ownership are to increase, and that "participation [issues] should be considered in reviewing the way in which the spectrum is allocated."[66] Specifically, the Task Force found that lotteries "would improve the opportunity of minorities," but that "the so-called auction concept placed minorities at a disadvantage" because "[u]nless some form of subsidy were available, minorities would be invariably outbid for properties."[67]

Thus, the prior cost constraints associated with licensing and spectrum alloation processes are a major factor in the selection of broadcast and non-broadcast licensees. Congress has concluded that "delays and expense which are often incurred with respect to certain ... proceedings can, in and [sic] of themselves, present a substantial barrier to entry into telecommunications markets by those who are presently unable to incur such costs."[68] The delays

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[65] We discuss the Constitutional implications of this interpretation of auctions in Section III of this report.

[66] Id. at pp. 10, 11.

[67] Id. at p. 10, n. 26.

[68] H.R. Conf. Rep. No. ___, __th Cong. __ Sess. __, reprinted in 198_ U.S.C.A.N. ____, ____.

associated with the comparative hearing process and the expense of competitive bidding makes it forseeable that those who are unable to absorb high entry costs will continue to face barriers of increasing proportions in attempting to gain access to licensing broadcast and non-broadcast opportunities.

Financial Factors. In the PCS report, the SBAC found that access to capital was a major barrier to entry opportunities for designated entities, but did not distinguish between categories for non-dominant entities in terms of relative accessibility to capital. While capital constraints are unlikely to foreclose participation by some segments of the non-dominant universe, constraints are likely to have an adverse effect on opportunities for other segments of the non-dominant universe that are capital constrained. To isolate significant financial impediments that may affect opportunities for non-dominant firms, it is helpful to compare investment prospects of publicly-traded non-dominant firms with those of pre-initial public offering (IPO) firms and businesses owned by women and members of minority groups.

While small publicly traded firms are highly competitive in the stock market in terms of current valuation, investor sentiment, and historical trading patterns, disparate access to conventional sources of debt and equity financing are two formidable areas of difficulty for pre-IPO firms. Ready availability of credit to small business has generally declined in recent years. Although loan quality perceptions contributes to this problem, the inability to collateralize FCC licenses, bias against small loan amounts, and substantial losses experienced by banks during the fall-out from highly-leveraged transactions of the 1980s are two major factors.

Venture capital firms are also providing decreased levels of funding for small, pre-public offering firms. Between 1983 and 1987 venture capital firms invested $15 billion in small business with a peak of $4 billion in 1987. After 1987, venture capital for small businesses decreased annually to a low of less than $1.4 billion in 1990. This decrease, moreover, was accompanied by a shift toward investing in established firms that are in later stages of business development, and increased competition for capital from foreign firms attempting to exploit U.S. capital markets.[69]

Empirical data suggests that business groups that are members of underrepresented communities face the most rigid capitalization barriers within the non-dominant universe. Graph B, shows that start-up debt and equity capital for non-minority firms was nearly two and a half times that of African-American firms. Other studies show disparities in the approval of short-term bank loan applications between non-minority firms, on one hand, and African-American and Hispanic firms on the other, as indicated in Graph C. Studies on telecommunications industry obstacles show that the

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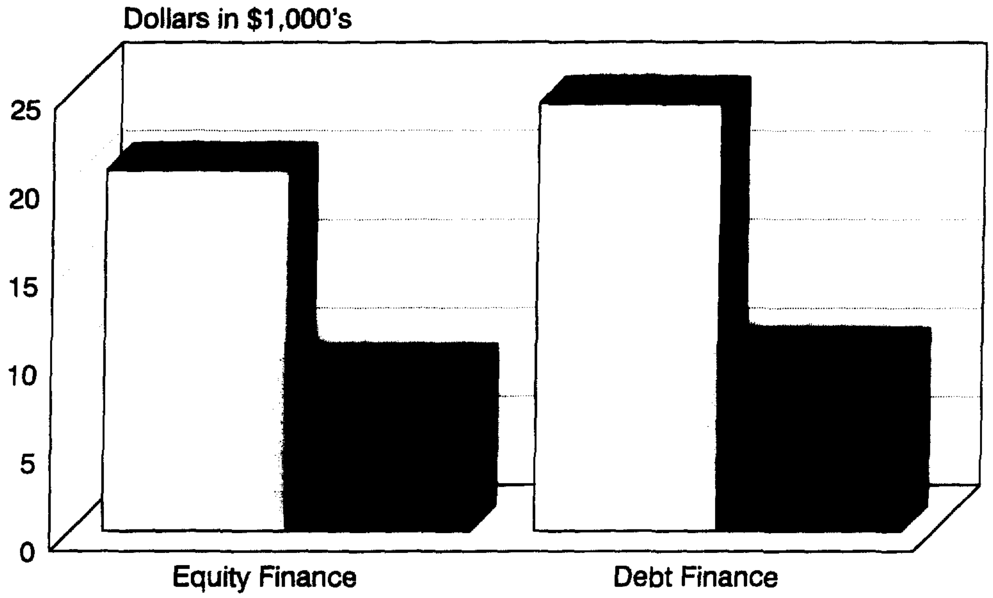
[69] See e.g., Leonard, Richard, "Foreign IPOs leave home to woo US Investors," Global Finance, may 1993, p. 19-20 (citing example of Scandinavian Broadcasting System, a former state operated television organization, that raised $52 million from IPO of 4 million shares); Reingold, Jennifer, "Bringing Up Baby," Financial World, September 14, 1993, p. 34 (Middle eastern communications and technology firm trading on NASDAQ); and "Israel: The New York Showcase," Institutional Investor, July 1993, p. 19-21 (several dozen Israeli companies have gone public on Wall Street).

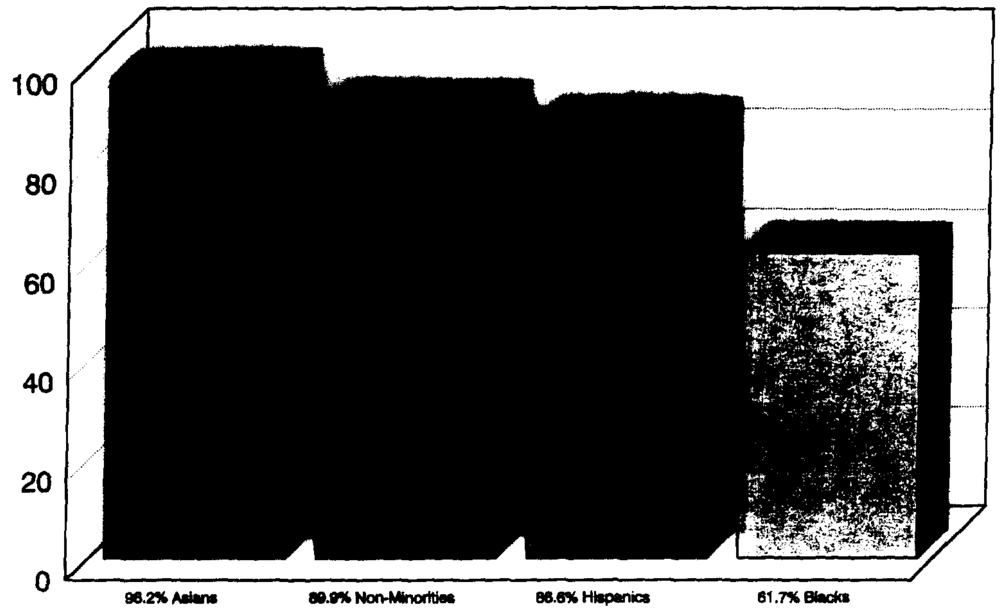
general findings about access to capital apply to FCC regulated industries. Access to capital was reported by minority telecommunications firms more often than any other obstacles (Graph

Average Start-Up Equity and Debt Capital Differentials By Group



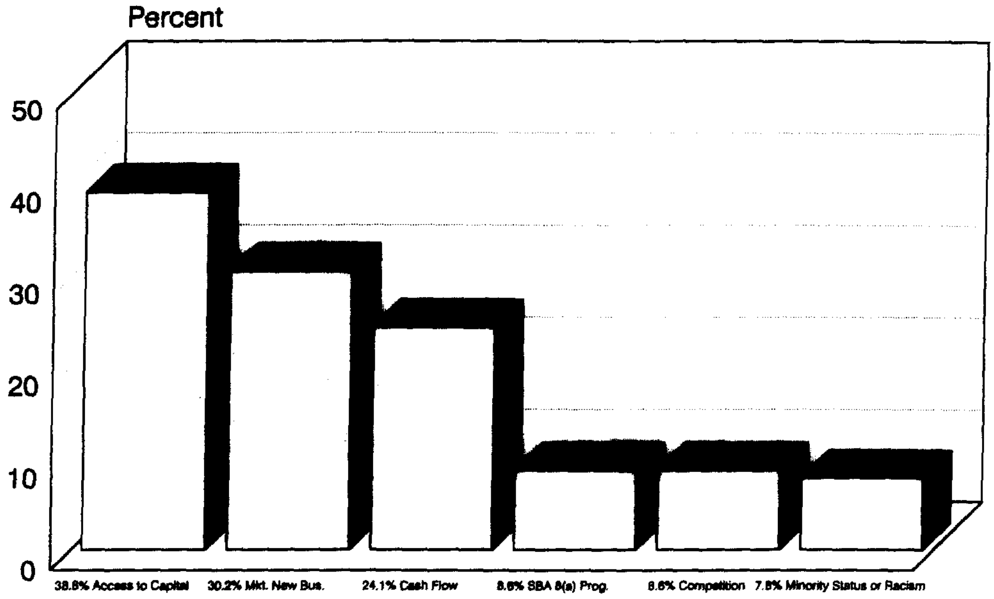
Source: Bates, *The Role of Black Enterprise in Urban Economic Development* (1992)

Success Rates for Short-Term Bank Loan Application by Group



Source: Faith Ando, Capital Issues and Minority Owned Business, Review Black Policy Economy 77-109 (1988)

Telecommunications Industry Obstacles Reported by Minority Firms



Source: U.S. MBDA Telecommunications Study on: MBE Participation (1991)

D), and data on start-up funding showed that nearly half of all respondents started with less than $20,000 (Graph E).

There is no consensus among community advocates and industry analysts about the causation of financial disparities. Lenders are private businesses, primarily obligated to use safe and solid lending practices for the benefit of their stockholders. Theoretically, underprofitability and unequal distribution of risk associated with different population and neighborhood groups accounts for lending disparities. For this reason, it has traditionally been assumed that disparities in loan approval reflect applicant characteristics that did not conform to traditional underwriting criteria. Recent studies, however, document other causes of disparate access to credit stemming from regulatory underwriting criteria and institutional behavior of the lending organizations.

Surveys by the Federal Reserve suggest that vague community reinvestment standards mandated by various fair lending laws may contribute to unduly rigid application of lending guidelines in some instances. "[L]enders express frustration that federal financial regulatory agencies may criticize the very loans the agencies are otherwise encouraging."[70] One problem is that some "non-traditional loans . . .satisfy examiners monitoring CRA compliance, but [are] downgraded by commercial examiners unfamiliar with [appropriate loan enhancements]." These problems lead many

[70] Garwood & Smith, Federal Reserve Bulletin, April 1993, p. 263.

banks that are hard asset lenders to deny loan commitments acquisition of FCC licenses for want of collateral, while transaction costs deter loans in amounts small enough for the least capital intensive communications market segments.

Based on data collected pursuant to the Home Mortgage Disclosure Act, however, both the Federal Reserve and academic researchers have concluded that economic factors related to borrower characteristics and federal underwriting guidelines do not explain lending disparities in their entirety. One explanation offered is that the variation in the distribution of credit among lenders partly reflects significant differences in the institutional structure, policy and practices of lenders. Federal Reserve testimony submitted to Congress acknowledges anecdotal evidence that losses on lending that addresses CRA responsibilities are not greater than other areas of lending. Recent empirical studies of local HMDA data also suggest lenders who redline are not more profitable than those that do not. The inference to be drawn from these factors is that lender behavior is an independent factor that contributes to credit unavailability.

Recent bank examinations evaluating compliance with CRA and Equal Credit Opportunity Act confirm that performance of banks with less than satisfactory performance is frequently characterized by shortcomings in two areas. Less than successful examinee banks failed to commit significant dollars to lending and investing for community development. The examinations also revealed a total or partial failure to achieve an appropriate geographical distribution of small business loan products throughout the underperforming bank's community.[71]

While no conclusive evidence linking processing disparities and per se discriminatory lending practices, available empirical data suggests that lender bias towards geographical areas populated by minority communities or regulatory malfunctions partly account for surplus credit demands of minority and female applicants. As one Federal Reserve official stated in a report to Congress, "we are beyond the point of debating whether disparate treatment of minorities is occurring in credit markets. We have known for some time that certain segments of our society, particularly minority consumers and minority small business owners, have difficulty obtaining credit. This difficulty has had an impact on the ability ... to build businesses, own homes, accumulate wealth, and generally, participate in our economy on an equal footing. We now know that this difficulty may not be justified by economic factors alone."[72] Under these circumstances, it strains credulity to assume that equal opportunities are available to obtain bank financing for FCC license acquisition.

There is also clear and convincing evidence of government bias in granting loans and loan guarantees. In a climate of financial retrenchment, it is universally acknowledged that the credit problems of small media market licensees would be less

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[71] Rutledge, Federal Reserve Bulletin, Aug. 10, 1993, p. 934.

[72] Garwood, Federal Reserve Bulletin, February 1993, p. _.

severe if those entities were eligible for the same treatment as other small businesses with respect to SBA financial assistance. Under the so called "opinion molder rule," however, the SBA prohibits extension of loans and loan guarantees to firms that disseminate intellectual property, including broadcasters and other FCC-regulated media entities. Between 1978 and 1986, the SBA recognized an exception to the general rule permitting FCC regulated broadcasters and cable operators to receive financial assistance, but the SBA repealed this exception in 1986.[73] Recent reports indicate that "stand alone broadcast entrepreneurs and small market stations seeking to borrow small amounts" encounter difficulties obtaining debt financing from both large and small institutional lenders.[74] Ironically, it appears that the only federal court of record to review the opinion molder rule found that it was unconstitutional as applied because it unreasonably burdens speech and discriminates against information disseminators since they lack federal protections similarly situated entities in other fields now enjoy.[75].

Opportunity Costs of Structural Constraints

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[73] In FY 1984, the SBA approved 70 loan applications averaging $248,861 for radio and TV broadcasters, cable systems and related industries. See, 51 FR 10363.

[74] Sukow, "In Radio Financing, Small Is Not Beautiful," Broadcasting, September 21, 1992, p. 41.

64 Mission Trace Investments, Ltd. v SBA , 622 F. Supp. 687 (D.C.Colo. 1985) (holding that opinion molder rule was unconstitutional as applied to dinner theatre).

The major implication of FCC dockets on new and existing markets is that restraints on non-dominant entry probably result in substantial opportunity costs, and that additional measures are needed to stimulate economic growth and investment in response to public need and demand for diverse ways to satisfy contemporary communications requirements. As shown in SBAC market studies, non-dominant market forces possess technical capabilities, and micro-economic and demographic characteristics, that directly address the public need for flexible diffusion of communications technology. However, prior administrative, regulatory, and financial restraints attributable in part to actions of the federal government, currently impede non-dominant investment. Whether one characterizes these restraints as the result of deliberate or passive government action, it is hard to escape the conclusion that these prior investment restraints deter utilization of non-dominant entities. These restraints have dual significance, moreover, in that they deny the public benefit of an effective consumer protection tool, while also denying non-dominant entities the full opportunity and open door to compete and innovate that all individual applicants are entitled to receive.

In reaching the conclusion that significant opportunity costs are probably associated with various impediments to non-dominant entry, the SBAC relies on the proposition that the value of spectrum is derived by comparing consumer and producer surplus to what might be gained under alternative conditions. The SBAC has not had the resources to engage in multivariable regression analysis or other sophisticated statistical research methods to support this conclusion. Instead, the SBAC relies on interpretations of available data, and the predictive judgement and real world experience of its membership, to conclude that optimal gains in economic efficiency and consumer surplus will probably materialize on a smaller scale than might otherwise be the case without fundamental changes in spectrum allocation to encourage increased non-dominant ownership and participation and technological innovation.[76] To remove financial, regulatory, and administrative restaints that inhibit diffusion, access, and economic growth, structural measures will definitely be needed. As explained in the following section, the Commission has adequate regulatory tools and jurisdictional bases to preempt the repetition of historical exclusion in the context of the information superhighway.

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[76] According to one estimate, the past cost saving benefits of increased technology diffusion may have amounted to as much as $81 billion betwen 1963 and 1982. See, DRI, McGraw-Hill, The Contriutions of Telecommunciations Infrastructure to Aggregate and sectroal Efficiency (1991). It is likely that the non-dominant market sector will contribute substantially to comparable gains in the future, depending on the regulatory structure adopted for emerging technologies. See generally, Gorosh, supra.

FCC REGULATORY JURISDICTION

Legal Overview

The SBAC is mindful that the Commission has an obligation to take constitutional safeguards into account in determining how it will exercise its jurisdiction to regulate commerce in communications. In the Competitive Bidding Notice, for instance, the Commission observed that there are "special constitutional concerns associated with preferential measures aimed towards minorities and women"[77] which require a convincing and comprehensive record demonstrating consistency with intermediate scrutiny standards of review. The SBAC would have greater concerns about these issues if it had proposed racial or gender-based quotas. Because the licensing proposals set forth in the SBAC's PCS Report extend eligibility to all non-dominant entities that the Commission would designate, we are much more confident that the prosposal will pass constitutional muster. Nevertheless, the regulatory and constitutional rationale for designating any business groups for differential treatment is an important component of the policy development process for basic reasons of fundamental fairness.

Over the past decade, disappointed applicant have repeatedly invoked Fifth Amendment principles to challenge racial and gender preferences. The intermediate scrutiny standard of review for Fifth Amednment equal protection cases holds that a minority or gender conscious regulation will be sustained if it is intended to further an important governmental interest, and substantially related to

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[77] Competitive Bidding Notice, at p. 23, para. 73.

the objective.[78] The cases decided under this standard teach that "one of our most cherished constituional and societal principles is that an individuals tastes, beliefs, and abilities should be assesses on their own merits rather than by categorizing that individual as a member of a ... group presumed to think and behave in a particular way."[79] The Supreme Court has made it clear, however, that the Fifth Amendment does not bar the use of regulatory measures that consider factors related to race or gender among several other factors, and should be balanced against interests arising under other constitutional guarantees.

In Metro Broadcasting, the Supreme Court approved the Commission's use of preferential enhancement credits in comparative hearings, and distress sales privileges in license revocation proceedings, to promote viewpoint diversity and minority ownership of broadcast facilities. A majority of the justices concurred with this assessment based on extensive record of intergovernmental deliberations between Congress and the Executive Branch, and subsequent legislative findings concerning the need for remedial and non-remedial intervention in telecommunications policy development.[80] "[W]e are 'bound to approach our task with

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[78] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1453 (D.C. Cir. 1985), supra, citing United States v. O'Brien (cite omitted).

[79] Steele v. FCC, 770 F. 2d 1192, 1198 (1985); see also, Lamprecht v. FCC, 958 F. 2d 382 (D.C. Cir. 1992).

[80] The Brief of the U.S. Senate described those purposes in terms of a balancing of public interests: "Congress's determination that the policy incorporating [preference] measures strikes an appropriate balance between the interests of broadcast

appropriate deference to the Congress, a co-equal branch [of the federal government] charged by the Constitution with the power to 'provide for the ... General Welfare of the United States' and to enforce, by appropriate legislation' the equal protection guarantees of the Fourteenth Amendment... [D]eference [is] appropriate in light of Congressional institutional competence as the national legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." Metro Broadcasting, slip op. at p. 12. The majority's opinion indicates earlier Executive Branch findings formed part of the foundation for FCC Continuing Appropriations Acts, and that FCC diversity policy in this sense responds the joint "intentions of Congress and the Executive."[81]

The decision in Metro Broadcasting finds considerable support in well established principles of First and Fifth Amendment jurisprudence which act to limit government power to allocate valuable opportunities in an exclusionary manner. The First Amendment protects the right of every citizen to reach the minds of any willing listeners and, thus, the speaker's opportunity to win their attention. These principles have led the federal courts invalidate both state and federal regulations the courts interpreted as prior restraints on opportunities to engage in

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licensees on the one hand, and the national interests in providing equal opportunity to all citizens and access to diverse sources of expression, on the other hand, is worthy of this Court's deference. Brief of the United States Senate as Amicus Curea in Metro Broadcasting, Inc. v. FCC, at p. 34.

[81] Lamprecht v. FCC, slip. op. at p. 24.

protected speech.[82] As new services, products, and technologies expand the avenues commerce and individual self-expression, it especially important to consider issues about regulation of telecommunications market entry and participation against the background of a profound national commitment to the principle that free flow of information on public issues and business affairs should be "uninhibited, robust, and wide-open."[83]

The Supreme Court has also recognized, as a priniciple of Fifth Amendment due process, that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate... Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." In particular, the courts have been concerned where individuals "lacking both personal wealth and affluent backers are in every practical sense precluded" no matter how qualified they are or intense the need for their services.[84] As a result, governmental selection processes that directly or indirectly tax speech have traditionally been considered constitutionally significant and subject to "close scrutiny."[85]

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[82] See, Grosjean v. American Press Co., 297 U.S. 444 (1936); see also, Daniels Cablevision, Inc. v United States, Civil Action No. 92-2292, at p. 21.

[83] New York Times v. Sullivan, 376 U.S. ___, 270 (1963).

[84] Bullock, supra.

[85] Bullock v. Carter, 92 S. Ct. 849 (1972); Harper v. Virginia Board of Elections, 86 S. Ct. 1079 (1966); see also United States v. Texas, 252 F. Supp. 234, 254 (D.C. Tx. 1966); Harman v. Forssenius, 85 S. Ct. 1177; United States v. State of Alabama, 252 F. Supp. 95 (D.C. Ala. 1966); Edwards v. People of State of California, 62 S. Ct. 164; Griffin v. People of Illinois, 76 S.Ct. 585; Douglas v. People of State of California, 83 S. Ct. 814.

Government Interests in Economic Opportunity

The SBAC discerns ample evidence suggesting that Congress viewed the goal of promoting economic opportunities for non-dominant firms qualifies as an important government objective and benefit for the public. In passing the Small Business Act of 1953, Congress stated that "preservation and expansion of ... competition is basic not only to the economic well-being but to the security of this Nation." Economic opportunities for non-dominant entities in the field of communications uniquely promote the important interests the Nation's economic welfare and security by encouraging larger non-dominant use of radio in new and existing markets, correcting present effects of past inequities, and avoiding potential undue concentration of ownership.

A history of repeated congressional legislation in the field of communications based on the findings by two FCC-chartered advisory bodies furnishes further evidence of Congress' view that economic opportunity constitutes an important government objective. In the legislative history of the 1981 lottery statute, for example, Congress found in regard to minorities and women, among others, that "[t]hese are groups which are inadequately represented in terms of nationwide telecommunications ownership..." Congress has since reaffirmed its findings concerning minorities and women on numerous occasions through the Communications Amendments Act of

1982,[86] and, beginning in 1987, the continuing appropriations legislation directing the Commission to maintain its diversity policies.[87] The legislative history of the Cable Television Consumer Protection and Competition Act of 1992 reflects ongoing concern of Congress in this area.[88] In view of this background, impediments to minority and female ownership would appear to take on additional significance in services where media functionalities are present. The commitment to economic opportunity may also be understood in the context of prior legislative proceeding which reduced "the need for fresh hearings or prolonged debate."[89]

Although consistency with the views of the Executive Branch policy is not essential to the validity of an Act of Congress, such concurrence adds additional weight to the determination in question where matters bearing on matters of national security are involved. The Executive Branch has recognized, by assigning responsibility for minority enterprise development to the Secretary of Commerce, that "[t]he opportunity for full participation in our free

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[86] H.R. Conf. Rep. No. 765, 97th Cong. 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2237, 2287. ("the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe under-representation of minorities in the media of mass communications) <u>cited in</u> <u>West Michigan v. FCC</u>, 735 F. 2d 601, n.5 (D.C. Cir. 1984).

[87] See, <u>Metro Broadcasting, Inc.</u>, supra, p. 3013-16 (reciting extended legislative history of the diversity provisions of the FCC's appropriations statutes).

[88] H.R. Rep. No. 102-62, 102d Cong., 2nd session, at 144 (1992).

[89] <u>Notice</u>, at p. 23, n. 48 (citing language from <u>Fullilove</u> quoted in <u>Metro Broadcasting, Inc.</u>)

enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our economy."[90] The Executive Branch has also recognized the remedial rationale for intervention in the field of telecommunications policy by assigning responsibility for "remedial action" to the Secretary of Commerce.[91] The FCC has executed several interagency agreements with Commerce agencies to "formalize our cooperative efforts to increase minority ownership in telecommunications businesses" pursuant to these executive orders.[92]

The policies of Congress and the Executive Branch both confirm the need for economic opportunity objectives in the field of telecommunications to avoid exclusion of minorities and women, undue concentration of ownership, and to encourage larger use of radio.[93] "The information marketplace provides much more than economic good ... assuring a diversity of information sources is

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[90] Executive Order 11625, p. 1; see also, U.S. Department of Commerce, Minority Business Involvement in the Telecommunications Industry, (December 30, 1982) ("The lack of minority participation in telecommunications at a time of rapid technological growth, increasing ownership concentration, and high capital costs creates a substantial danger that minorities will be left behind in the industry.").

[91] Executive Order 12046, §5-102; See, Telecommunications Minority Assistance Program, 1978 Pub. Papers 253 (President Carter).

[92] Letter of Janice Obuchowski, Asst. Secretary for Communications and Information, to Hon. Alfred Sikes, FCC Chairman, July 25, 1990. See also, Report of FCC-NTIA-MBDA Interagency Committee of Communications Staff Representatives For 1991-1992, (1992).

[93] Dames & Moore v. Regan, 453 U.S. 2972 (1981).

critical to the proper functioning of the entire democratic system."[94] In this regard, the goal of increasing viewpoint diversity upheld by the Supreme Court in the Metro case is another extremely important component of the economic opporunity objective.

Public policy has long recognized that non-dominant licensees and programmers have the capability to make significant contributions to the production and distribution of intellectual property. In this regard, the Supreme Court has long recognized that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[95] The District Court for the District of Columbia has similarly held that "in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws" applicable to common carriers.[96]

Congress and the Executive Branch have also recognized the potential contribution of non-dominant entities to viewpoint diversity. MMDS, a non-broadcast service subject to competitive bidding, was previously treated as mass media services under the 1981 and 1982 lottery statutes.[97] On that basis, Congress authorized

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[94] U.S. v. ATT, [cite omitted].

[95] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[96] U.S. v. AT&T, 552 F. Supp. 131, 184 (1982).

[97] Also, for a discussion of functional equivalency standards, see American Broadcasting Companies, Inc. v. Federal Communications Commission, 663 F 2d 133 (1980) (functional equivalency analysis "looks to the nature of the services offered to determine likeness; the perspective of the customer faced with

measures to encourage diversification of ownership in those industries. The legislative history of the 1982 Lottery statute states that "a question arises as to the licensing of "services which may be neither clearly common carrier nor broadcast entities (such as multipoint distribution service), or service in which the applicant may be able to self-select either common carrier or broadcast status (such as the Commission's treatment of the direct broadcast satellite service). The Conferees intend that the Commission apply significant preferences [for diversification of ownership and minority ownership] ... to the extent that licenses have the ability to provide under their direct editorial control a substantial proportion of the programming or other information services over the licensed facilities." (parentheses in the original).[98]

Congress has reaffirmed its earlier view in recent legislation. In 1992, Congress' extended its earlier efforts to promote diversification by establishing a national policy of promoting availability to the public of a diversity of views and information through multiple technology video distribution media in the 1992 Cable Act.[99] The legislative history of the Spectrum Act also noted in qualifying Congress' understanding regarding the inapplicability of diversity principles by stating that "most of

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differing services is often considered a significant factor").

[98] House Conference Report on the Communications Amendments Act of 1982, at p. 2256.

[99] 47 U.S.C. 623 (b)(1).